

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **FOR THE WESTERN DISTRICT OF TEXAS**  
                  **AUSTIN DIVISION**

3 UNITED STATES OF AMERICA,            ) AU:10-CR-00297(1)-LY  
  )  
4       Plaintiff,                        )  
  )  
5 VS.                                     ) AUSTIN, TEXAS  
  )  
6 DAVID ANDREW DIEHL,                 )  
  )  
7       Defendant.                       ) OCTOBER 17, 2011

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9                   TRANSCRIPT OF STATUS CONFERENCE

10                  BEFORE THE HONORABLE LEE YEAKEL

11                  \*\*\*\*\*

12 APPEARANCES:

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19  
20  
21  
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23  
24 Proceedings recorded by computerized stenography, transcript  
25 produced by computer.

13:29:56 1 (In Chambers)

13:29:56 2 THE COURT: We're here this afternoon in chambers on  
13:30:01 3 *United States v. Diehl*, Number 10-CR-297-LY. Mr. Matt Devlin  
13:30:09 4 is here for the government. Defendant's counsel is also here,  
13:30:16 5 as is the probation officer. Mr. Morris for the defendant.

13:30:23 6 What I wanted to talk about today is we're set a week  
13:30:28 7 from today for the sentencing in Mr. Diehl's case. I have over  
13:30:33 8 the past couple of weeks -- I guess now almost a month --  
13:30:36 9 received three different motions from the defense, one of which  
13:30:40 10 is a Motion For Leave to File Additional Objections to the  
13:30:43 11 Presentence Investigation Report, another one which is a Motion  
13:30:49 12 to Exclude Impact Statement and Testimony, and the third one is  
13:30:52 13 Motion to Disclose Potential Mitigating Evidence.

13:30:55 14 Based on my initial review, and I will say that I  
13:31:00 15 have not looked at these in huge detail, this all seems to  
13:31:05 16 revolve around testimony that the defense believes that the  
13:31:12 17 government is going to put in evidence at the sentencing  
13:31:15 18 hearing, which is currently set for October the 24th, 2011, of  
13:31:22 19 a person who was not depicted in the evidence that was produced  
13:31:29 20 at the trial of this cause, a person referred to as "S.B."

13:31:37 21 So what I wanted to get together and talk about is  
13:31:43 22 what is the government's position on the motions? Does the  
13:31:48 23 government intend to present evidence about this person? And  
13:31:56 24 if so, what the government has that has not been previously  
13:32:07 25 provided to the defendant, because clearly I think if the

13:32:10 1 government is going to offer evidence in this regard, the  
13:32:14 2 defense gets an opportunity to attempt to rebut it.

13:32:18 3           So, Mr. Devlin, I'll start with you. Then I'll hear  
13:32:20 4 from Mr. Morris. And if Probation wants to chime in, you're  
13:32:28 5 more than welcome. So, Mr. Devlin, where are we here, and what  
13:32:34 6 is the easiest way to satisfy the government's needs, the  
13:32:39 7 defense's needs, and the Constitution of the United States?

13:32:44 8           MR. DEVLIN: Okay.

13:32:44 9           THE COURT: That shouldn't be very hard for you.

13:32:46 10           MR. DEVLIN: Not at all, Judge. Hopefully I can do  
13:32:47 11 it in three sentences or fewer.

13:32:49 12           I'm going to respectfully disagree with your summary  
13:32:52 13 of what I see is going on, and I'll tell you why.

13:32:55 14           THE COURT: All right.

13:32:56 15           MR. DEVLIN: We do not intend to present testimony of  
13:32:59 16 S.B. We never did intend to present her testimony, except at  
13:33:03 17 trial. And I did notify the defense through a 404(b) notice  
13:33:06 18 that there was an allegation made by S.B. regarding an incident  
13:33:13 19 in Williamson County in 2000 -- excuse me -- back in the time  
13:33:17 20 frame we're talking about, about 2000, 1999, that wasn't  
13:33:20 21 reported until 2008. Beyond that, since we had the bench  
13:33:24 22 trial, I had no intent whatsoever to call S.B. as a witness at  
13:33:28 23 all.

13:33:29 24           Mr. Morris's concern -- and I'll let him obviously  
13:33:32 25 correct this -- S.B. was at sentencing on -- back in June.

13:33:37 1 THE COURT: No. Wait a minute --

13:33:39 2 MR. DEVLIN: At the sentencing hearing --

13:33:40 3 THE COURT: At the hearing, yes.

13:33:41 4 MR. DEVLIN: Excuse me.

13:33:41 5 -- that was later continued. She was there, to my  
13:33:44 6 understanding, with the intent to come up and speak when the  
13:33:47 7 Court opened the floor up for anybody to speak at sentencing.

13:33:51 8 In addition to that, her father was at the bench  
13:33:53 9 trial that we had back in February. And as a result of that,  
13:33:58 10 he submitted to you what has been entitled a Victim Impact  
13:34:02 11 Statement. I don't know if that's really an accurate legal  
13:34:05 12 description of what that should be. I'd probably call it more  
13:34:08 13 of a "citizen's statement," if you will, to describe to you  
13:34:11 14 information that he wanted you to have for sentencing. Okay.

13:34:13 15 S.B. is not a crime victim, as defined by federal  
13:34:19 16 law, because she was not -- we did not charge Mr. Diehl with  
13:34:22 17 having produced any child pornography in which she was a  
13:34:27 18 victim. And I think Mr. Morris was mistaken for some time in  
13:34:32 19 believing that this other victim who was identified in the  
13:34:37 20 presentence report was S.B., when, in fact, it was another  
13:34:39 21 female whose last name escapes me. Her first name, though,  
13:34:44 22 begins with the letter "C" and I'll just refer to her as  
13:34:48 23 "Victim C."

13:34:48 24 Victim C is the victim who was referenced in  
13:34:52 25 paragraph 37 of the presentence report. Victim C, to my

13:34:56 1 knowledge, was not at sentencing. S.B. is not a victim of this  
13:35:00 2 case. We believe frankly that she is a victim, but not of the  
13:35:05 3 federal charges. And so S.B. was simply there to speak to the  
13:35:11 4 Court upon the open invitation at the appropriate time to say  
13:35:17 5 whatever it was she was going to say. I don't even know if she  
13:35:20 6 would have spoken to the Court. I know that she was prepared  
13:35:23 7 to, but I don't know if she would have.

13:35:24 8 But that's what that statement was that you had  
13:35:26 9 received on S.B.'s behalf that including the photographs and I  
13:35:30 10 guess a description of the impact on that family. So I wanted  
13:35:33 11 to clarify that we do not intend to call her.

13:35:36 12 THE COURT: That's not that much different than what  
13:35:38 13 I said.

13:35:39 14 MR. DEVLIN: Well, I just want to make sure. You  
13:35:40 15 were saying that we were going to put testimony on.

13:35:42 16 THE COURT: No, I didn't. I said I don't know if you  
13:35:44 17 intend to. I said Mr. Morris perceived, as I read the  
13:35:49 18 motions --

13:35:49 19 MR. DEVLIN: Okay.

13:35:50 20 THE COURT: -- that you were intending to offer that.

13:35:51 21 MR. DEVLIN: I think that -- I wanted you -- you came  
13:35:53 22 up with an impression. I wanted to make sure the impression  
13:35:56 23 was ...

13:35:56 24 THE COURT: No. Far be it for me to ever try to  
13:35:59 25 anticipate what either the government or the defense is going

13:36:00 1 to do at a sentencing hearing.

13:36:02 2 MR. DEVLIN: And no offense intended. I just wanted  
13:36:04 3 to make sure that you were clear on the fact that we were not  
13:36:07 4 intending to present her testimony, except that it was going to  
13:36:10 5 possibly come up at trial. But since we're now past trial and  
13:36:14 6 we did not call her at trial, I have no intent -- and I've even  
13:36:17 7 expressed to Mr. Morris -- I have no intent to call her as a  
13:36:21 8 witness. But that doesn't mean she won't speak at sentencing  
13:36:24 9 when invited by the Court to do so. So that's -- hopefully  
13:36:27 10 that clarifies things.

13:36:28 11 So I do -- I do oppose this motion to the extent that  
13:36:33 12 he wants any additional information. I did disclose as part of  
13:36:36 13 the 404(b) notice filing way back when to Steve Orr when he was  
13:36:42 14 on the case, there was a Williamson County Police report that  
13:36:45 15 described the statement that was made by S.B., the allegations  
13:36:49 16 and what have you. And that has be disclosed to the defense.  
13:36:52 17 That's all the information that I have. That's all the  
13:36:55 18 information I would intend to disclose.

13:36:57 19 I did probably -- I think he mentions -- Mr. Morris  
13:37:01 20 mentions that I may have blacked out the name of the facility.  
13:37:04 21 And I did that frankly for privacy reasons. I don't think it  
13:37:08 22 needed to be looked into any further. Obviously, if it became  
13:37:11 23 relevant at trial and the Court ordered me to do that, we would  
13:37:16 24 comply. But I wanted -- I'm assuming that Mr. Diehl is getting  
13:37:20 25 this information, which is fine. But I don't want him to know

13:37:22 1 where she was or have him pry into her life either. And that's  
13:37:26 2 why I blacked that out.

13:37:28 3 But beyond that, I don't have any records, I have  
13:37:30 4 nothing, and I don't feel I need to disclose anything since  
13:37:32 5 she is not going to be a government witness.

13:37:35 6 THE COURT: Mr. Morris?

13:37:35 7 MR. MORRIS: I agree basically with the facts as  
13:37:37 8 Mr. Devlin stated. Mr. Devlin and I did talk about this  
13:37:41 9 sometime before I filed this motion. He told me that he did  
13:37:44 10 not plan on calling her as a witness but couldn't assure me  
13:37:48 11 that he wouldn't, depending on circumstances of --

13:37:50 12 THE COURT: I think he's just assured you he's not  
13:37:53 13 going to call her as a witness.

13:37:55 14 MR. MORRIS: The reason that I thought that she was  
13:37:57 15 the person named in paragraph 37 of the PSR, Victim 4, I think  
13:38:03 16 as we are calling, it is the addendum and the original PSI  
13:38:08 17 reference that there was an attempt being made to get victim  
13:38:12 18 impact statements from this unknown victim. The addendum was  
13:38:16 19 issued on I believe the 11th of June. Then on the 13th of June,  
13:38:18 20 previous counsel received from the probation officer letters  
13:38:21 21 that were in the nature of victim impact statements. So I  
13:38:25 22 assumed that had to do with paragraph 37. And I understand now  
13:38:29 23 it didn't, so that changes the posture of things somewhat.

13:38:33 24 My concern is that, you know, having reviewed the  
13:38:40 25 discovery that Mr. Devlin provided me with, S.B. would

13:38:43 1 potentially say some very damaging things concerning  
13:38:50 2 allegations against Mr. Diehl.

13:38:52 3 THE COURT: Well, that may be true, but I think  
13:38:58 4 people get an opportunity from the public to speak at  
13:39:02 5 sentencings. Go ahead.

13:39:06 6 MR. MORRIS: The reason I'm concerned about her  
13:39:08 7 speaking and the reason that I and my client didn't want to sit  
13:39:13 8 still for it is because this case was no billed in Williamson  
13:39:17 9 County. It was presented to a grand jury there, and they  
13:39:20 10 declined to indict. It's not in the nature of Williamson  
13:39:24 11 County to overlook serious allegations like this for whatever  
13:39:29 12 reason.

13:39:31 13 As far as whether she -- a member of the public can  
13:39:37 14 speak or not, she has a right to speak if she's a victim under  
13:39:41 15 the Victim Rights Act. I can't remember the acronym right now  
13:39:48 16 that I cited argument cases in my motion. Her ability to speak  
13:39:51 17 otherwise is discretionary with the Court. The Court can, as  
13:39:55 18 the Court knows, consider anything that has sufficient indicia  
13:39:59 19 of reliability, et cetera.

13:40:00 20 What I am suggesting to the Court is that, because  
13:40:06 21 this is potentially very damaging information and is  
13:40:10 22 potentially very much contested and is clearly not coming from  
13:40:15 23 someone who's a victim as the law defines that of this offense,  
13:40:19 24 that that -- that statement be excluded or that she be allowed  
13:40:22 25 to speak after sentencing is pronounced, which by the way is



13:40:27 1 the procedure in state court to prevent -- to give people who  
13:40:31 2 are grieved by an individual the right to publicly air their  
13:40:38 3 feelings but at a time when it can't influence what the Court  
13:40:41 4 does.

13:40:42 5 THE COURT: Mr. Devlin, what's your reaction?

13:40:45 6 MR. DEVLIN: I agree that she's not a crime victim,  
13:40:49 7 but -- and I agree that, really, the only folks who have a  
13:40:52 8 right to speak at sentencing are the defendant, his attorney,  
13:40:55 9 the government, and then a crime victim. I am personally not  
13:40:59 10 clear on the basis for allowing anybody else to speak at  
13:41:02 11 sentencing other than the discretion of the Court.

13:41:04 12 But it seems to me that if the Court is going to  
13:41:06 13 exercise his discretion and allow anybody to come to speak to  
13:41:10 14 sentencing, this is certainly selective in not letting her  
13:41:14 15 speak. But it's okay if, you know, 50 defense witnesses come  
13:41:16 16 in or 50 defense-oriented folks come in and speak at  
13:41:20 17 sentencing. I mean, why isn't their statement excluded as  
13:41:24 18 well?

13:41:24 19 Her statement is going to be unsworn, as all of these  
13:41:27 20 statements are, not subject to cross-examination. Certainly  
13:41:30 21 the Court can -- is going to be well aware of that. That's  
13:41:35 22 certainly something that Mr. Morris can argue. The fact that  
13:41:37 23 it was no billed doesn't mean that it didn't happen. It just  
13:41:40 24 means Williamson County didn't pursue it to the extent that  
13:41:44 25 they probably should have back in 2008. But, nevertheless,

13:41:47 1 just because it's damaging to the defendant is not the basis  
13:41:51 2 for excluding it if the Court is going to allow people to come  
13:41:54 3 in and speak at sentencing.

13:41:56 4           It's a little bit of a twist, because 99 percent of  
13:42:01 5 the time that process is looked upon as being very favorable to  
13:42:05 6 defendants because mothers and grandmothers and friends come in  
13:42:08 7 and say nice things about the defendant. But suddenly when  
13:42:11 8 it's turned the other way and someone wants to say something  
13:42:15 9 that's not very nice, we're now wanting to subject it to  
13:42:18 10 exclusion. And I don't think that's an appropriate basis to do  
13:42:21 11 that.

13:42:21 12           So, again, she will come in -- I don't know if she  
13:42:24 13 will be there or not. But assuming she is and assuming she  
13:42:27 14 comes in to speak and assuming she comes in to speak  
13:42:30 15 consistently with the statement that's been provided to you, I  
13:42:32 16 think that is -- she has an equal right with anybody else who  
13:42:36 17 wants to come in to be able to do that if you're going to open  
13:42:39 18 up the floor for folks to be able to do that.

13:42:42 19           MR. MORRIS: May I respond?

13:42:43 20           THE COURT: You may.

13:42:43 21           MR. MORRIS: I don't think this is quite the ordinary  
13:42:45 22 case where several people come in and say good things about the  
13:42:50 23 defendant or several people come in and speak about, for  
13:42:52 24 instance, the impact of losing money in a fraud case or  
13:42:55 25 something like that. What S.B. is going to do is introduce

13:43:00 1 evidence of a completely separate offense, which is not part of  
13:43:05 2 what Mr. Diehl was indicted for. And, again, there's some  
13:43:12 3 evidence at least that those claims are questionable, given the  
13:43:18 4 actions of Williamson County.

13:43:20 5           What I'd ask for is the Court's discretion of not  
13:43:23 6 considering this at sentencing. If you are going to consider  
13:43:26 7 it, then there's maybe a wealth of information as to -- that  
13:43:31 8 would shed light on why it was no billed in her psychological  
13:43:35 9 records that would be coming from this facility in San Diego.  
13:43:38 10 And that would be what I would want to look at -- what  
13:43:41 11 statements did she make, what were -- what were her diagnoses,  
13:43:44 12 were there other instances of where she was untruthful about  
13:43:47 13 something or fantasized about something. I hate to speculate  
13:43:52 14 as to what it would be, but certainly that's the first place  
13:43:55 15 anybody would look.

13:43:56 16           MR. DEVLIN: Judge, may I just briefly respond?

13:43:59 17           THE COURT: Yeah.

13:43:59 18           MR. DEVLIN: Again, that's the nature of these  
13:44:01 19 unsworn statements. I would love to be able to get up there  
13:44:04 20 and question, say, the criminal history of some of the folks  
13:44:06 21 who are coming in to say some good things about defendants. We  
13:44:10 22 don't do that. We're not allowed to do that because, again,  
13:44:12 23 it's the nature of the proceeding. These are unsworn  
13:44:15 24 statements. And the Court is entitled to give them whatever  
13:44:18 25 weight that the Court feels is appropriate for those

13:44:20 1 statements.

13:44:21 2 Even with parents and brothers and sisters, a lot of  
13:44:24 3 the folks coming in, frankly, in other cases have been looked  
13:44:27 4 at under an investigation and not indicted for one reason or  
13:44:32 5 another. And, yet, we have not been able to present that to  
13:44:35 6 the Court through cross-examination. So, again, it's just kind  
13:44:38 7 of what's good for the goose is good for the gander here. It  
13:44:41 8 just seems just as simply somebody who is coming in to say some  
13:44:45 9 very unfavorable things about the defendant. At least that's  
13:44:49 10 what we anticipate. It happens to be about a crime as opposed  
13:44:53 11 to simply what their opinion is of the defendant. That  
13:44:56 12 shouldn't make a difference, and the Court is well equipped to  
13:44:58 13 be able to put that in the proper perspective.

13:45:01 14 THE COURT: Mr. Morris, anything further?

13:45:03 15 MR. MORRIS: I think the issues are joined.

13:45:05 16 THE COURT: All right. Is the Motion For Leave to  
13:45:08 17 File Additional Objections to the Presentence Investigation  
13:45:09 18 Report moot, or is that still alive? I don't really see that  
13:45:17 19 what we're talking about here today constitutes an objection to  
13:45:20 20 the presentence investigation report since you resolved the  
13:45:25 21 question of who was involved in paragraph 37.

13:45:29 22 MR. MORRIS: That's correct. The only hesitation I  
13:45:31 23 have was still objecting to the victim impact statements. But  
13:45:34 24 I guess those weren't submitted pursuant or ancillary to  
13:45:39 25 paragraph 37.

13:45:40 1 THE COURT: Yeah.

13:45:41 2 MR. MORRIS: So you're correct.

13:45:42 3 THE COURT: All right. Then -- then to try to clean  
13:45:44 4 this up, I'm going to deny the Motion For Leave to File  
13:45:47 5 Additional Objections to the Presentence Investigation Report.

13:45:50 6 Now, the problem with the rest of it is this is not  
13:46:01 7 Mr. Devlin's witness. If I allowed this statement, she would  
13:46:12 8 be -- S.B. would be a member of the public. There is nothing  
13:46:18 9 for Mr. Devlin to disclose about her because I presume you  
13:46:23 10 don't have it in your file.

13:46:25 11 MR. DEVLIN: I've disclosed what I do have regarding  
13:46:27 12 her based on our prior 404(b) notice, but I don't have any of  
13:46:32 13 this information beyond what has been supplied to the Court  
13:46:34 14 through S.B.'s father.

13:46:37 15 THE COURT: Well, I think Mr. Morris has everything  
13:46:40 16 that has been supplied to me, don't you?

13:46:42 17 MR. MORRIS: The only thing that I don't have that I  
13:46:45 18 think Mr. Devlin has is the name of the facility where she was  
13:46:48 19 treated.

13:46:49 20 THE COURT: Well, and he's stated why he hadn't  
13:46:51 21 provided that. This will not be taken as testimony. There  
13:47:04 22 will not be any questions or cross-examination. So if you had  
13:47:09 23 this information, I don't know what you would do with it,  
13:47:13 24 Mr. Morris. And I don't know how I really order it for  
13:47:18 25 somebody that is not a witness or party and is just going to

13:47:23 1 show up from the public.

13:47:26 2 MR. MORRIS: Frankly, what I would do with it if I  
13:47:28 3 had it, Your Honor, would be object to not being able to use  
13:47:32 4 it.

13:47:33 5 THE COURT: That's probably right. Well, I find that  
13:47:38 6 because the government has provided all of what it has to the  
13:47:45 7 defense regarding S.B. with the exception of the treatment  
13:47:49 8 facility near San Diego, California -- and that was excluded  
13:47:53 9 for privacy reasons, which I think is appropriate -- I'm going  
13:47:58 10 to deny the Motion to Disclose Potential Mitigating Evidence.

13:48:04 11 Now, that leaves what we're going to do next Monday  
13:48:08 12 if S.B. is here and desires to speak; and candidly, I want to  
13:48:29 13 look at this a little more carefully. We walk a fine line  
13:48:34 14 here. I understand what the government says about what applies  
13:48:42 15 in one case ought to apply in the other, but that's not always  
13:48:47 16 the face of the case here. We have an individual, Mr. Diehl,  
13:48:52 17 who is charged and has been convicted of an extremely serious  
13:48:58 18 crime after a bench trial.

13:49:03 19 Both the guidelines and the statute render a  
13:49:07 20 relatively long sentence. Whether I were to impose a guideline  
13:49:14 21 sentence or whether I were to go above or below the guidelines,  
13:49:20 22 there is still an exceptional range of punishment that is  
13:49:24 23 available here. So I don't think it is as simple as that.

13:49:36 24 There's much more danger with a statement that may or  
13:49:48 25 may not involve another crime in a case such as this than there

13:49:55 1 are with people who might say and will say good things about  
13:50:05 2 the defendant. But I do not know if it is your intention,  
13:50:13 3 Mr. Morris, to present a parade of witnesses to talk about what  
13:50:21 4 a useful citizen Mr. Diehl is or can be, because it seems to me  
13:50:30 5 then the government is allowed or would be allowed to in some  
13:50:36 6 way to try to contest that.

13:50:42 7           Mr. Devlin says no. He is happy to proceed with what  
13:50:47 8 he's got. But then S.B. comes up on her own, perhaps. So I  
13:50:53 9 think that's a -- I don't find that an easy matter. So what  
13:51:04 10 I'm going to do is to withhold ruling on your Motion to Exclude  
13:51:09 11 Victim Impact Statement and Testimony briefly -- because I want  
13:51:14 12 both of you to know what you're going to be in a position to  
13:51:18 13 have to deal with on Monday -- while I do a little additional  
13:51:22 14 work on it and will notify you accordingly as quickly as we  
13:51:27 15 can, hopefully by no later than Wednesday, so you know where  
13:51:34 16 you are on this and what's likely to appear.

13:51:39 17           My belief is, due to the fact that the father was  
13:51:44 18 here during the trial and I believe he's the statement that  
13:51:48 19 made -- the person that made a comment at one point when  
13:51:50 20 Mr. Diehl was being led from the courtroom. I was told there  
13:51:54 21 was a statement made. I didn't hear it. And the fact that  
13:51:58 22 S.B. was here once and the fact that as we granted additional  
13:52:04 23 time, Mr. Morris, for you to come up to speed, we allocated  
13:52:08 24 enough time to fit into the schedules of the people from the  
13:52:11 25 public who might have wanted to appear here, I think for

13:52:15 1 purposes of determining what we're going to do, we might as  
13:52:18 2 well just presume S.B. is going to be here. And so I'm  
13:52:21 3 confronted with the question of what to do about it, and I want  
13:52:25 4 to look at that a little more closely.

13:52:28 5 So we remain set for Monday. It is my intention to  
13:52:32 6 get the sentencing done on Monday, and I will get something to  
13:52:41 7 you as quickly as possible on this last remaining item.

13:52:46 8 Does anybody, including Ms. Shifflett with Probation,  
13:52:49 9 have anything else they want to raise or say anything about  
13:52:52 10 while I've got you all together about anything that's going to  
13:52:56 11 occur on Monday?

13:52:58 12 MR. MORRIS: I don't know if this will make any  
13:53:01 13 difference or not. I do not intend to present any live  
13:53:05 14 statements or testimony on Mr. Diehl's behalf. I do intend to  
13:53:09 15 submit a letter from his father and perhaps one more individual  
13:53:15 16 that knows him.

13:53:16 17 THE COURT: Letters or live testimony?

13:53:19 18 MR. MORRIS: Letters.

13:53:20 19 THE COURT: Okay.

13:53:23 20 MR. MORRIS: And if this really hinges on whether I  
13:53:28 21 submit those letters or not, I would consult with my client  
13:53:33 22 about submitting those -- the wisdom of submitting those.

13:53:36 23 MR. DEVLIN: Again, I guess -- well, it shouldn't,  
13:53:38 24 again, if the Court's going to open up the floor. My question,  
13:53:42 25 Judge, to you in light of your comments is, if S.B. walks up to



13:53:47 1 the podium after you've open the floor up to folks, what is  
13:53:51 2 going to be the procedure?

13:53:57 3 THE COURT: Well, if I open the floor up to other  
13:53:59 4 folks, it has generally been my procedure to just allow people  
13:54:04 5 to make their statements. We -- I don't think I've had a  
13:54:09 6 situation where I've had questions from either defense or  
13:54:15 7 government or anybody even requesting to question people. They  
13:54:21 8 go up, they make stair statements, and they return to the  
13:54:24 9 audience.

13:54:25 10 MR. DEVLIN: Right.

13:54:25 11 THE COURT: The only time that there's been  
13:54:27 12 questioning is if it's a government witness that the government  
13:54:30 13 feels that the government needs to put on. And in the past,  
13:54:36 14 that's generally been to substantiate the calculations in the  
13:54:41 15 presentence investigation report, and it usually involves  
13:54:46 16 relevant conduct. And then, of course, in that case where a  
13:54:49 17 witness is called, they are put on the stand and sworn, and the  
13:54:52 18 government does what the government will do with the witness  
13:54:55 19 and the defense gets a chance to cross-examine.

13:54:58 20 But my feeling on this would be that it's like what I  
13:55:05 21 generally open up in the audience and people can come forward  
13:55:08 22 and have their say and there won't be questioning involved.

13:55:11 23 MR. DEVLIN: I guess my question was really in the  
13:55:13 24 context of your holding decision on this motion in abeyance I  
13:55:19 25 guess pending whatever develops on Monday.

13:55:22 1 THE COURT: No. I hope to rule on this Wednesday.

13:55:24 2 MR. DEVLIN: Oh, before that. Okay.

13:55:25 3 THE COURT: Yeah. I just want to look at it a little  
13:55:27 4 bit and determine what I want to do. This is different than  
13:55:30 5 the normal case I get for a lot of reasons, not the least of  
13:55:34 6 which I generally don't have bench trials in criminal cases.  
13:55:38 7 This was a bench trial, so I've already seen the evidence. I  
13:55:41 8 know what the -- the evidence of the crime is. I would have  
13:55:44 9 seen that had it been a jury case also.

13:55:48 10 But we have had this set a couple of times. I have  
13:55:53 11 been through the presentence investigation report pretty  
13:55:57 12 thoroughly. I have been through everything that I have  
13:56:02 13 received pretty thoroughly. Just because somebody makes a  
13:56:07 14 statement doesn't mean that I necessarily consider that. I  
13:56:12 15 don't always consider everything that's said in the courtroom  
13:56:16 16 in determining what I think the appropriate sentence under  
13:56:20 17 Title 18, Section 3553 is to be. But that's what I want to  
13:56:29 18 think through before I determine what I'm going to do here.

13:56:33 19 But I'm not going to carry it until I see what goes  
13:56:37 20 on at the sentencing hearing. I'm going to make a decision as  
13:56:40 21 to what I am going to do with regard to S.B. at a time  
13:56:46 22 hopefully very quickly, when you both will know what it is, and  
13:56:50 23 so everyone will know what I'm going to be considering. And  
13:56:56 24 that will be based on a ruling with regard to Mr. Morris's  
13:57:05 25 motion where I say I'm going to consider it or I'm not going to

13:57:10 1 consider it.

13:57:13 2           And I don't know what effect that will have on her  
13:57:17 3 and her father if I were to rule that I'm not going to consider  
13:57:20 4 it. But I'm going to make that ruling ahead of time, so  
13:57:26 5 everyone will know. It is possible one of the options is to  
13:57:33 6 allow her to speak but let it be known at the beginning that  
13:57:37 7 I'm not going to consider it for purposes of the sentence that  
13:57:40 8 I'm going to impose at the close of the evidence. There's  
13:57:46 9 options available out there, and that's what I want to think  
13:57:50 10 through.

13:57:50 11           MR. DEVLIN: Okay. So I just want to make clear,  
13:57:52 12 too, we're not -- I'm basically going to concede that her  
13:57:56 13 statement to you in writing that's already been submitted is  
13:58:00 14 not a victim impact statement since she's not a crime victim.  
13:58:03 15 So I hope that your decision will not hinge on the  
13:58:05 16 characterization of that statement. If we could change that to  
13:58:08 17 a citizen statement or something else, I'm not going to urge it  
13:58:12 18 on the Court as a victim impact statement. But it will be just  
13:58:16 19 a statement just like the statement from his dad -- from  
13:58:20 20 Mr. Diehl's dad. It's just a statement submitted to you for  
13:58:23 21 your consideration regardless of what the title is on it. I  
13:58:26 22 don't have it in front of me. I haven't looked at it lately.  
13:58:30 23 It may not say "Victim Impact Statement." And if it doesn't,  
13:58:34 24 then that's fine.

13:58:35 25           THE COURT: Well, why don't we take a look at it.

13:58:37 1 MR. MORRIS: I think the fax from Probation says  
13:58:43 2 something about "Impact Victim Statement." I think that's  
13:58:46 3 where I got that language.

13:58:48 4 PROBATION OFFICER: To be honest, Judge, I wasn't  
13:58:50 5 sure how I addressed it in the addendum. The reason I included  
13:58:54 6 it is my understanding with Williamson County when I spoke with  
13:58:58 7 the prosecutor there or the investigator is that they were --  
13:59:03 8 their intent was at the time when I wrote the report was they  
13:59:06 9 were going to present again to the grand jury. Obviously, they  
13:59:13 10 have not done that. But that was the information I had at the  
13:59:16 11 time.

13:59:25 12 THE COURT: Did you attach it?

13:59:27 13 MR. DEVLIN: I've seen it.

13:59:28 14 PROBATION OFFICER: Yes, sir. It was attached to the  
13:59:30 15 addendum.

13:59:31 16 MR. MORRIS: I believe it was a separate fax, I think  
13:59:35 17 two days later.

13:59:38 18 MR. DEVLIN: I think it was separate as well because  
13:59:38 19 it's not part of my addendum.

13:59:38 20 MR. MORRIS: Yeah. I put in my motion that the  
13:59:40 21 addendum came on the 10th and the letter came on the 13th. I  
13:59:44 22 didn't bring the -- bring the letters.

13:59:47 23 THE COURT: Here it is. No.

13:59:54 24 PROBATION OFFICER: That's the father. Right. And  
14:00:02 25 it was a letter.

14:00:03 1 MR. DEVLIN: One of them is entitled Victim --  
14:00:07 2 Victim's -- Victim, with an apostrophe "S," impact statement  
14:00:10 3 from S.B.'s father.

14:00:12 4 THE COURT: I have two letters, one as which is as  
14:00:14 5 described by Mr. Devlin. And it's got the typed names at the  
14:00:18 6 bottom of Janet and Jim Brigham.

14:00:21 7 PROBATION OFFICER: Correct.

14:00:22 8 THE COURT: And a second one which appears to be a  
14:00:24 9 letter addressed to prisoner David Diehl.

14:00:27 10 PROBATION OFFICER: Correct.

14:00:28 11 THE COURT: So that's what we're talking about in the  
14:00:30 12 way of statements.

14:00:31 13 MR. DEVLIN: And there were photographs, I thought.

14:00:32 14 PROBATION OFFICER: Yes. there were photographs  
14:00:33 15 attached to it as well.

14:00:35 16 MR. DEVLIN: Yes. There it is.

14:00:37 17 THE COURT: Yeah. And the photograph of her in the  
14:00:39 18 hospital bed -- several photographs of her in the hospital bed.

14:00:47 19 All right. Okay. I'll get something.

14:00:53 20 PROBATION OFFICER: Judge, can I just clarify one  
14:00:55 21 little thing?

14:00:56 22 THE COURT: You may.

14:00:57 23 PROBATION OFFICER: I note in Mr. Morris's motion as  
14:01:00 24 well there were objections to some language. In the personal  
14:01:03 25 history section, I just wanted to make sure that we're not

14:01:07 1 addressing those.

14:01:08 2 MR. MORRIS: There was one other objection that I  
14:01:11 3 requested leave to file -- Mr. Diehl asked me to file that had  
14:01:15 4 to do with the characterization of -- in the PSI that he began  
14:01:20 5 watching child pornography at a certain time. His -- he thinks  
14:01:26 6 that the language is important. What he in fact said was that  
14:01:29 7 he first saw child pornography at the particular time. "Began  
14:01:34 8 watching" in his mind indicates that there was an ongoing  
14:01:38 9 frequent course of action.

14:01:39 10 THE COURT: Why don't you just change that. Is that  
14:01:42 11 a problem?

14:01:44 12 PROBATION OFFICER: Well, I'm not -- I wasn't sure.

14:01:46 13 THE COURT: I don't know what the difference is.

14:01:48 14 PROBATION OFFICER: Right.

14:01:49 15 THE COURT: But, again, to try to avoid things we  
14:01:53 16 don't need to have, what difference does it make to the  
14:01:58 17 government or to probation if it says that he first viewed as  
14:02:02 18 opposed to began watching. I think that's the difference.

14:02:08 19 PROBATION OFFICER: Again, I don't have a problem  
14:02:12 20 but, you know, I know when we interviewed -- when I interviewed  
14:02:16 21 him, certain languages -- but to me, it's semantics.

14:02:21 22 THE COURT: Well, it is a direct quote or is it  
14:02:24 23 semantics? If it's a direct quote, it's one thing. If it's  
14:02:28 24 interpretation, it's another thing.

14:02:30 25 PROBATION OFFICER: When I questioned him, I

14:02:31 1 specifically asked when did he begin viewing, is the word I  
14:02:34 2 used -- viewing child pornography.

14:02:36 3 THE COURT: So what specifically was his answer? Did  
14:02:38 4 he just give you a date or did he say, "I first observed ..."

14:02:42 5 PROBATION OFFICER: He told me he began viewing child  
14:02:46 6 pornography in a certain year. And I don't have my --  
14:02:49 7 obviously, I don't have my notes in front of me.

14:02:51 8 THE COURT: I don't think it's going to make any  
14:02:53 9 difference to the Bureau of Prisons.

14:02:54 10 MR. MORRIS: It makes no difference to anyone but  
14:02:57 11 Mr. Diehl, and that's why he's instructed me to file -- file  
14:03:02 12 the objection. I think that he believes that what he intended  
14:03:08 13 to import and what he thinks he said was, I first saw child  
14:03:12 14 pornography at a particular time and didn't intend to connote  
14:03:15 15 that it was -- that he began a practice at that point of  
14:03:18 16 viewing child pornography.

14:03:20 17 PROBATION OFFICER: And I think there's also  
14:03:22 18 reference to the fact that he indicated to me that his  
14:03:24 19 preference was young girls between the ages of this age and  
14:03:30 20 this age was also called into question. And so I just -- I was  
14:03:34 21 just trying to clarify as far as the objections. Again,  
14:03:39 22 it's --

14:03:39 23 THE COURT: Well, how much time do y'all anticipate  
14:03:49 24 we would spend on this? It just seems to me that if it's  
14:03:54 25 something as minor as some wording, it wouldn't be a problem

14:04:00 1 for you to add another addendum and we get this behind us.

14:04:04 2 I will tell you from my point of view in determining  
14:04:06 3 what I'm going to take into account in assessing a sentence, it  
14:04:10 4 makes no difference to me whether it says I began watching or I  
14:04:15 5 first saw, watched, or observed. That is not where -- you  
14:04:23 6 know, what I'm looking at in order to determine what I think  
14:04:26 7 is -- is an appropriate sentence in this case.

14:04:31 8 PROBATION OFFICER: Yeah. I'd be glad to address it  
14:04:36 9 in a second addendum based upon, you know, it's basically  
14:04:40 10 the -- my questioning and this is how he responded, because I'm  
14:04:44 11 not going to be here Monday. And so I just wanted to make sure  
14:04:47 12 that everything is addressed.

14:04:48 13 THE COURT: Why don't you get us an addendum that  
14:04:51 14 states whatever you want to state in the addendum.

14:04:56 15 PROBATION OFFICER: Yes, sir.

14:04:57 16 THE COURT: And you can show at the appropriate time  
14:05:00 17 to Mr. Diehl the addendum and say that you brought it up and  
14:05:05 18 that I've instructed the probation office to do an addendum on  
14:05:09 19 this. Does that work for you, Mr. Devlin?

14:05:11 20 MR. DEVLIN: Whatever the Court wants. Mr. Diehl --  
14:05:16 21 you know, this is he said what he said to the probation  
14:05:20 22 officer.

14:05:20 23 THE COURT: I know.

14:05:21 24 MR. DEVLIN: He said what he said to his attorney.

14:05:23 25 THE COURT: And you can put it in the addendum that



14:05:28 1 you understood his statement to be ...

14:05:30 2 PROBATION OFFICER: Yes, sir.

14:05:30 3 THE COURT: And that the attorney has said, and  
14:05:32 4 you're aware of that, that what he meant to convey was such and  
14:05:37 5 such.

14:05:38 6 PROBATION OFFICER: Yes, sir. I will do that. I  
14:05:39 7 just wanted to --

14:05:40 8 THE COURT: And that way it's an addendum to the PSI,  
14:05:43 9 so for whatever purpose the Bureau of Prisons might use it or  
14:05:46 10 anybody that has the PSI. And you may tell Mr. Diehl that,  
14:05:51 11 candidly, when I read the report, I read through that  
14:05:54 12 language. That is not one of the areas that I'm looking at in  
14:05:57 13 determining what kind of sentence to impose in this case.

14:06:01 14 So trying to make sure everybody is okay here. We  
14:06:06 15 have enough huge issues in this case on sentencing and a big  
14:06:12 16 enough sentencing range to where I've got my work cut out for  
14:06:17 17 me anyway. And this is not something that I'm going to dwell  
14:06:20 18 on.

14:06:20 19 PROBATION OFFICER: Yes, sir.

14:06:21 20 THE COURT: So let's do that.

14:06:22 21 All right. So other than the motion to exclude, I  
14:06:26 22 think we've done everything else; is that correct?

14:06:29 23 MR. DEVLIN: Yes, sir.

14:06:29 24 THE COURT: Anything else, Mr. Devlin?

14:06:31 25 MR. DEVLIN: No, sir.

14:06:31 1 THE COURT: Anything else, Mr. Morris?

14:06:33 2 MR. MORRIS: No, Your Honor.

14:06:34 3 THE COURT: Anything else, Ms. Shifflett?

14:06:35 4 PROBATION OFFICER: No, sir.

14:06:36 5 THE COURT: All right. See you all Monday, and we

14:06:38 6 will do what we can. Thanks for being available.

0:0:0 7 (End of transcript)

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1 **UNITED STATES DISTRICT COURT        )**

2 **WESTERN DISTRICT OF TEXAS            )**

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